United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

974

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,930

ARTHUR S. CURTIS, Executor
of the Estate of Edith C. Kojouharoff (Mrs.),

Appellant,

and

ARTHUR S. CURTIS, Individually,

Appellant,

v.

HERMAN A. MILLIKAN,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT (WITH APPENDIX)

Arthur S. Curtis
816 National Press Building
Washington D.C. 20004

Attorney for Appellants

Washington, D. C. - THIEL PRESS - 202 - 393-0825

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UNITED STATES COURT OF APPEALS
for the District of Columbia

No. 23,930

Arthur S. Curtis, Executor
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and

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v.

Herman A. Millikan,

Appellee,

Appeal from the United States District Court
for the District of Columbia

Arthur S. Curtis
816 National Press Building
Washington, D. C. 20004
Attorney for Appellants

QUESTIONS PRESENTED

1.

WHETHER PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT WHEN DEFENDANT WHO REARENDED PLAINTIFF'S AUTO, ADMITS THAT HE, DEFENDANT, DID NOT SEE A THIRD CAR WHICH WAS SLIGHTLY TO HIS RIGHT AND TO THE FRONT OF HIM AND WHICH CUT ACROSS THE PATH OF PLAINTIFF'S CAR CAUSING PLAINTIFF TO JAM ON HIS BRAKES IN ORDER TO AVOID STRIKING THE THIRD CAR.

2.

WHETHER SUMMARY JUDGMENT SHOULD BE GRANTED AGAINST A DEFENDANT WHO FOLLOWS PLAINTIFF'S CAR APPROXIMATELY ONE CAR LENGTH BEHIND ON A ONE-WAY STREET WHEN DEFENDANT FAILS TO SEE A THIRD CAR TWO LANES TO HIS RIGHT AND SOMEWHAT FORWARD WHICH IS TRAVELING IN THE SAME DIRECTION ON A ONE-WAY STREET, UNDER CIRCUMSTANCES WHERE THE DEFENDANT IS UNABLE TO CONTROL HIS CAR SUFFICIENTLY TO PREVENT THE REAR-ENDING OF THE PLAINTIFF'S CAR AFTER PLAINTIFF STOPPED SUDDENLY IN ORDER TO AVOID STRIKING THE THIRD VEHICLE.

3.

WHETHER SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY IS A REMEDY WHICH IS OPEN TO THE PLAINTIFF, OR WHETHER IT IS ONLY OPEN TO THE DEFENDANT IN A PERSONAL INJURY CASE.

4.

WHETHER A DEFENDANT SHOULD BE PERMITTED TO FILE AN ANSWER AFTER FIVE YEARS WHEN THE ADDED TIME IS PREJUDICIAL TO HIS ADVERSARIES.

5.

WHETHER A VERDICT OF THE JURY SHOULD BE REVERSED OR SET ASIDE WHEN THERE IS AN AFFIDAVIT THAT THE JURY FAILED TO FIND IN FAVOR OF A DECEASED PLAINTIFF ON THE GROUND THAT SHE WAS DEAD AND DEAD PEOPLE DID NOT NEED ANY MONEY.

6.

WHETHER THERE ARE ANY RESTRICTIONS AT ALL ON THE FINAL ARGUMENT OF COUNSEL.

7.

WHETHER IT IS ERROR TO FORBID A LAWYER TO TRY HIS CASE WHEN HE IS THE ONLY EYEWITNESS SURVIVING TO TELL THE STORY FOR HIMSELF AND HIS PASSENGER, AND WHEN HE HAS HANDLED THE CASE FOR BOTH HIMSELF AND HIS PASSENGER UP TO THE DAY OF TRIAL.

8.

WHETHER STATEMENTS MADE IN OPEN COURT BY COUNSEL ARE BINDING UPON THE CLIENTS.

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IN THE

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 23,930

Arthur S. Curtis, Executor
of the Estate of Edith C. Kojouharoff (Mrs.),

Appellant,

and

Arthur S. Curtis, Individually,

Appellant,

v.

Herman A. Millikan,

Appellee,

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Jurisdiction if Invoked under 28 U.S.C. 1291.

This case has not been before this Court before.

REFERENCES TO RULINGS, RULE 8 (e)

The Rulings and Orders of the Court below, prior to trial, the Verdict and Judgment of the Jury, and the Post trial Orders of the Trial Judge denying three Motions for New Trial, are reproduced in full immediately following this page, and for that reason will not be found in the Appendix.

ORDER

This matter came on for hearing on plaintiff's motion for summary judgment, and upon co sideration of tne pleadings, the depositions, and arguments of the respective counsel in open Court, it is by the Court this 31st day of March, 1966,

Ordered that the said motion be, and the same hereby is, denied.

(Oliver Gasch)

Judge

Record, p.82

O R D E R

Upon consideration of the Motion to strike the answer of the third party plaintiff, Herman A. Millikan, to the counterclaim of the third party defendant, Arthur S. Curtis, and of the objections to the recommendations of the Pre-Trial Examiner entered on July 29, 1968, and after having considered the papers in support of the Motion and the objections and those filed in opposition thereto, and after having had the benefit of oral argument by counsel for the third party plaintiff, it is this 26th day of September, 1968,

ORDERED, that the Motion to strike the answer and the objections to the Pre-Trial Examiner's recommendation be, and the same are, hereby denied.

JUDGE, United States District Court for the District of Columbia

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Order was mailed, postage prepaid, this 25th day of September, 1968, to Arthur S. Curtis, Esq., pro se, at 816 National Press Building, Washington, D. C. 20004.

Joseph S. McCarthy
Attorney for Herman A. Millikan

ORDER

Upon consideration of a Motion for Summary Judgment upon the third party complaint by the third party defendant, Arthur S. Curtis.....it is this 5th day of Jul y 1966

ORDERED that the Motion for Summary Judgment be and the same is hereby denied;....

Joseph C . McGarraghy

(Judge)

Record, p. 101

ORDER

Upnn consideration of the Motion to Strike Defenses and enter Judgment in favor of Plaintiff and the third party defendant, with Points and Authorities in support thereto, and after having heard oral argument of counsel, it is this 24th day of June 1966

ORDERED that the Motion be and the same is hereby denied.

(Joseph C McGarraghy)

Judge

Record, p.98

CLERK'S OFFICE
United States District Court for the District of Columbia

Curtis, et al.
(Plaintiff)

vs.

Millikan
(Defendant)

} Civil Action No. 3995-62

There was entered on the docket September 26, , 1969

an ~~order~~ (judgment) verdict and judgment for deft.

Waddy, J.

ROBERT M. STEARNS, Clerk

HARRY M. HULL, CLERK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ARTHUR S. CURTIS, etc., et al.

Plaintiffs

v.

HERMAN A. MILLIKAN

Defendant

Civil Action
No. 3995-62

ORDER DENYING MOTION FOR NEW TRIAL

Upon consideration of the motion of the plaintiff for a new trial and the points and authorities submitted in support thereof, it is by the Court this 16th day of October, 1969,

ORDERED, that said motion be and the same hereby is denied.

Joseph C. Waddy
United States District Judge

CC: Jack H. Olender, Esq.
CC: Joseph S. McCarthy, Esq.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ARTHUR S. CURTIS, EXECUTOR, ET AL.)
)
Plaintiffs) Civil Action
)
v.) No. 3995-62
)
HERMAN A. MILLIKAN,)
)
Defendant)
)

FILED
12 FEB 1970
ROBERT M. STEARNS
CLERK

O R D E R

Upon consideration of plaintiffs' motion for further consideration of motion for new trial and affidavits submitted in support thereof, it appearing to the Court that plaintiffs' contentions are without merit, it is by the Court this 11th day of February, 1970,

ORDERED, that said motion is hereby denied.

/s/ Joseph C. Waddy

Joseph C. Waddy
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ARTHUR S. CURTIS, Executor, et al.,
Plaintiffs
v.
HERMAN A. MILLIKAN,
Defendant

Civil Action
No. 3995-62

ORDER

Upon consideration of plaintiffs' motion for further consideration of motion for new trial and the affidavit submitted in support thereof, and the opposition submitted thereto, it appearing that this Court lacks jurisdiction because this cause has been appealed and is now pending in the United States Court of Appeals for the District of Columbia Circuit, (Checker Cab Co. v. Maryland, 79 U.S. App. D.C. 39, 142 F. 2d 95 (1944); Z & F Assets Realization Corp. v. Hull, 31 F. Supp. 371, 374 (D.D.C. 1940); Earle v. United States, 152 F. Supp. 555 (E.D.N.Y. 1957)), it is by the Court this 30th day of March, 1970,

ORDERED, that said motion be and it is hereby denied.

(Signed) JOSEPH C. WADDY

Joseph C. Waddy
United States District Judge

STATEMENT OF THE CASE

A) MATERIAL FACTS

1. This is a personal injury case. An automobile accident occurred in the District of Columbia on May 25, 1962, at 10 p.m. to-wit on 19th Street, NW, on a one-way street heading south between Eye Street and Pennsylvania Avenue. The parties agree that the first lane of traffic on the left was occupied in whole or part by parked autos. Three cars were originally involved, but contact occurred only between the auto of Millikan and the auto of Curtis when Millikan rearended Curtis. The third auto, driven by one Woltz, had cut to the left towards the Curtis car, Curtis swerved and braked and avoided Woltz, but was struck from behind by Millikan.

2. Edith C. Kojouharoff (Mrs.), then age 72, a retired DC teacher, was a passenger in Curtis' car. Mrs. Millikan was a passenger in the Millikan car. The Woltz car contained Mr. and Mrs. Woltz and two children.

3. Mr. and Mrs. Millikan were returning from Duke Zeibert's, where they admitted taking "two drinks" and food in celebration of their tenth wedding anniversary.

4. Millikan admitted on deposition and testified on the stand that he did not see the Woltz auto but that Woltz returned to the scene and stated that he had cut in front of Curtis. Mrs. Millikan stated that she did not see the Woltz car as it swerved ahead and stated that she remembered an auto returning to the scene.

5. Mrs. Kojouharoff filed suit against Woltz and Millikan on December 24, 1962, through attorney Arthur S. Curtis, in whose auto she was a passenger. On January 18, 1963, Millikan moved for leave to add a third party defendant, and upon granting of this Motion, brought suit against Arthur S. Curtis, alleging that Curtis was solely or contributorily negligent and asking for contribution or indemnity.

6. On February 14, 1963, Curtis filed an Answer and Cross-claim, demanding damages of $50,000, plus the costs of this suit. Milikan failed to answer this Cross-claim. Millikan filed no Cross-claim against Woltz. Woltz died from another accident and he was deleted from the suit, with all rights reserved against Millikan.

7. On May 19, 1966, Curtis and Mrs. Kojouharoff moved for Summary Judgment on grounds that in his deposition Millikan admitted negligence when he stated that he did not see Woltz even though Woltz was ahead and to the right of Millikan on a one-way street traveling in the same direction. This Motion was denied. At the hearing on the Motion, Millikan's counsel argued that no claim was being made that Curtis was guilty of negligence. Curtis later moved on the bases of this statement by Millikan's counsel to strike the claim against him by Millikan, and this was denied; and the trial judge ruled that this statement by Millikan's counsel could not be read to the Jury.

8. On May 22, 1968, Curtis' Cross-claim against Millikan was dismissed under Local Rule 13, for failing to take a default against Millikan.

9. On May 28, 1968, Mrs. Kojouharoff filed a Motion to Advance her case for trial on grounds that she was almost 80 years old and her health was poor. This Motion was denied.

10. In a letter explaining why his Cross-claim had been dismissed, addressed to Curtis, Chief Judge Curran said: (quote in full).

11. On June 5, 1968, Chief Judge Curran reinstated the Cross-claim of Curtis.

12. On June 6, 1968, Curtis took a default against Millikan.

13. On June 10, 1968, Curtis moved for a Judgment by Default against Millikan on the issue of liability for both him and Mrs. Kojouharoff.

14. On June 21, 1968, Chief Judge Curran denied the Motion for Judgment based upon the default.

15. On September 19, 1968, Mrs. Edith C. Kojouharoff died, at the age of 80, without having had her day in Court.

16. On September 26, 1968, the Default against Millikan was vacated, and he was permitted to file an Answer to Curtis' Cross-claim.

17. According to the pre-trial statements, Mrs. Kojouharoff claimed specials of $7,313, and Curtis claimed specials of more than $4,000. Medical witnesses at trial testified that both Mrs. Kojouharoff and Curtis had permanent injuries from the accident.

18. All legal matters for both Mrs. Kojouharoff and Curtis prior to trial had been handled by Arthur S. Curtis. To

assist him at trial, Curtis employed Jack Olender, a member of the Bar of this Court.

19. At the trial, Judge Waddy denied to Curtis the right to examine witnesses or to argue to the jury, and Curtis objected, but permitted him to argue to the Court out of the presence of the jury, and to be present and speak on legal matters in Chambers.

20. The trial for both Mrs. Kojourharoff, by Arthur S. Curtis, her Executor, and for Arthur S. Curtis, individually, was conducted solely by Mr. Olender.

21. During trial, Judge Waddy ruled that the photograph of the Plaintiff, Edith C. Kojouharoff, could not be shown to the jury, the counsel objected. Her deposition was read to the jury.

22. On September 25, 1969, the jury, on its first day of deliberation, sent in a note, which read:

> "Your Honor, May we please have all the exhibits.
> David W. Littlefield, Foreman."

23. On September 25, 1969, the jury sent in another note, viz:

> "Your Honor, May we have a list of the charges we have to decide, the choices we have to make.
> David W. Littlefield, Foreman."

24. Also on Sept. 25, 1969, the jury sent in a third note, which read,

> "Your Honor, the question on the charges was cleared up by your answer, David W. Littlefield, Foreman."

25. The jury was unable to agree on Sept. 25, and was sent home.

26. On September 26, 1969, the jury sent in this note,

"Your Honor, we are unable to reach a decision,
David W. Littlefield, Foreman."

27. Thereafter, the Trial Judge gave the Jury a charge, and they returned with a verdict for Millikan and against Curtis and Mrs. Kojouharoff.

28. A Motion for New Trial was filed by Mr. Olender, based upon statements made by counsel for Millikan at final argument, which motion was denied. The remarks referred to Olender, Curtis, and Dr. Herzmark, a treating physician. These remarks are attached as Exhibits.

29. At this point in the case, Mr. Olender resigned, and the case came back to Arthur S. Curtis. Curtis filed two Motions for further consideration of the Motion for New Trial, presenting affidavits by himself and James Doud, a member of the Bar of this Court. Quotations from the affidavits of James Doud follow:

Affidavit of February 3

"1. That on 2/3/70 at about noon I went to the Library of Congress Annex, where I spoke to David Littlefield, who, to my personal knowledge, was the jury foreman in the above entitled case.

2. That I stated to him that an attempt was being made to reevaluate the plaintiff's legal position from the standpoint of a new trial. I than asked him why the jury had given no award to Mrs. Kojouharoff, the woman. He replied:

"Because she was dead and we felt that a living person shouldn't have to give something to a dead person."

3. Mr. Littlefield stated that he would not sign any statement. He also said that he would now have to contact the lawyer on the other side to tell him that he had spoken to me, as he had done in the past. Previously, he stated, he had called to Mr. McCarthy's office and spoken to his partner about t he case.

4. I am a practising member of the District of Columbia. I have no financial interest in the outcome of this case."

Affidavit of March 4, 1970

"2. That on March 4, 1970, I James F. Doud contacted Roger Young at the United States Department of Labor where he is employed and presented certain oral interrogatories to him;

3. That in response to an interrogatory, as to why the jury did not find affirmatively for Mrs. Kojouharoff, the female passenger in the car of Mr. Curtis, Mr. Roger Young, who identified himself as a member of the jury in the case, replied: "We did not give the woman anything because it would go to Mr. Curtis." He stated that the jury reached this conclusion as a result of what they understood the Judge to tell them;

4. That this was the understanding of the entire jury;

5. I asked Mr. Roger Young, would he please sign his name to the answers which he had just given to the questions that he was asked. He replied in the negative."

30. Millikan filed no opposition to the original Motion for New Trial. He filed no Counter Affidavits to the Affidavits filed by James Doud. He filed no objection to the first Motion for Further Consideration of the Motion for New Trial; upon filing of the second Motion for Further Consideration, Millikan filed a paper stating that the Court had no authority to consider the matter further, and in its forthcoming order, the Court agreed.

31. The Appeal was timely noted, docketed, and the record was brought here in a timely manner.

B) DISPUTED FACTS

32. Curtis contends that his vehicle was in the second lane from the left and that Millikan was tailgateing him. This is also the contention of Mrs. Kojouharoff. Curtis contends that he swung from the second lane to the first lane and jammed on his brakes to avoid Woltz, and stopped within a few feet. He contends that he was going fifteen to twenty miles per hour. He contends that the distance between his car and Millikan's closed as they approached Pennsylvania. Mrs. Kojouharoff contends that Millikan was so close behind that the headlights were no longer visible in the rear view mirror.

33. Millikan contends that he was in the second lane from the left and that Curtis was either in the third lane or jointly in the third and second lane, that the Millikan car was either one, one and a half, or two car lengths behind the Curtis auto, and that in swerving, Curtis cut in ahead of him and stopped, and that, depending on whether it is his deposition, or his testimony at trial, he was going twenty to twenty-five miles per hour.

STATEMENT OF POINTS

1. THE COURT ERRED IN DENYING THE MOTIONS FOR SUMMARY JUDGMENT FILED BY MRS. KOJOUHAROFF AND CURTIS.

2. THE COURT ERRED IN FAILING TO STRIKE THE CLAIM OF CONTRIBUTORY NEGLIGENCE AGAINST CURTIS AFTER HIS OPPONENT HAD ARGUED IN OPEN COURT THAT CURTIS WAS NOT CONTRIBUTORILY NEGLIGENT.

3. THE COURT ERRED IN VACATING A DEFAULT WHICH WAS GRANTED BECAUSE AN OPPONENT HAD FAILED FOR FIVE YEARS TO FILE AN ANSWER TO A COUNTERCLAIM.

4. THE COURT ERRED IN DENYING MOTIONS FOR NEW TRIALS BASED UPON IMPROPER REMARKS AND FINAL ARGUMENT AND UPON AFFIDAVITS WHICH SHOWED THAT THE JURORS HAD DISREGARDED THE INSTRUCTIONS AND WERE MOTIVATED BY PASSION AND PREJUDICE.

5. THE COURT ERRED IN FORBIDDING THE ADMISSION INTO TRIAL EVIDENCE OF A STATEMENT BY DEFENSE COUNSEL AT A PRIOR HEARING THAT THE THIRD DRIVER, WOLTZ WAS THE SOLE CAUSE OF THE ACCIDENT, SINCE IT RELATED TO THE DEFENSE THAT PLAINTIFF WAS NOT CONTRIBUTORILY NEGLIGENT.

6. THE COURT ERRED IN HOLDING THAT CURTIS COULD NOT PARTICIPATE IN THE TRIAL AS A LAWYER WHEN HE HAD HANDLED THE CASE UP TO THE DAY OF TRIAL.

7. THE COURT ERRED IN IGNORING THE RULINGS IN THIS COURT IN THE CASE OF OLENIN VS. CURTIN AND JOHNSON RELATIVE TO THE CONDUCT OF COUNSEL DURING FINAL ARGUMENT.

SUMMARY OF ARGUMENT

1.

Summary judgment on the issue of liability should have been granted against defendant Millikan after Millikan admitted in his deposition that he had not seen one of two cars in front of him when all three cars were travelling in t he same direction on a one-way street and the third car cut in front of the second car causing the second car to slam on its brakes and swing to the left in order to avoid a collision between the third and second car, under circumstances where the Millikan car was behind the second car by approximately one length and was unable to control his car sufficiently to keep from rearending the second car. To drive his car so closely behind the second car as to lose his ability to keep from running into it was antecedent negligence.

2.

Statements by Counsel in open court are admissions even if made as arguments, and a statement that only Woltz was liable could be used against the sayer to strike that sayer's claim that Curtis was also liable.

3.

A party who has failed to answer a counterclaim for five years is barred from answering that counterclaim after a default has been taken.

4.

A new trial must be granted when the jury considers that a party who has died does not need any money and therefore should not receive a verdict.

5.

There are limits to what Counsel may argue on final argument, and those limits have been passed when Counsel expresses his opinions or assails the character of trial Counsel.

6.

It is error to permit evidence in a personal injury case that a claimant has had prior claims particularly when a claimant is an attorney and when a personal attack is made by opposing Counsel upon that attorney in his capacity as an attorney.

7.

An attorney who has handled a case for himself and his passenger should be permitted to handle the trial as one of two attorneys who represent the two parties at the trial.

ARGUMENT

I.

THE COURT ERRED IN DENYING THE MOTIONS FOR SUMMARY JUDGMENT FILED BY MRS. KOJOUHAROFF AND CURTIS

(a) F.R.C.P.#56, Summary Judgment, reads as follows:

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) Case Interpretations.

This relief is to be granted where the undisputed facts are such that the moving party is entitled to judgment as a matter of law. Fletcher v. Krise, 73 App. D.C. 266, 120 F. 2d 809 ( ); Miller v. Miller, 74 App. D.C. 216, 122 F. 2d 209; Christianson v. Gaines, 85 U.S. App. D.C. 15, 174 F. 2d 534 ( ); Poller v. Columbia Broadcasting System, Inc., 82 S. Ct 486, 368 U.S. 464, 7L. Ed. 2d 458 (U.S. App. D.C. 1962).

(c) Excerpts From The Depositions Of Mr. Millikan and Mrs. Woltz, Dec. 6, 1963 Found At R,74

(A refers to answer of Mr. Millikan. Q refers to question. ... refers to material deleted, between answers.)

Q. You were with Mrs. Millikan, I take it?

A. That is right. May the 25th was our wedding anniversary.

...

A. I expect I had a cocktail or two before dinner...

A. No, I didn't notice any cars out on another lane. I was informed of a car being on the outside lane later on...

A. I saw it after it had made a turn...

A. It's a one way street...I was in lane No.2.....

A. I was driving in the aforementioned Lane No.2 of 19th Street, the car to my right front swerved all of a sudden over in front of me and slammed on their brakes. I could not avoid bumping the car in front of me and so there was contact between the right front of my automobile and the left rear of the car that had swerved into the left lane in my path, and the driver of the other car, Mrs Curtis, and myself both got out of the car and I asked Mr. Curtis why he swerved over into my lane and threw on his brakes. "He said there was a car on the right of him that had made a lefthand turn and that he was forced to avoid contact with that car.

"At that time Mr. Curtis then said that he thought he had the license number.....then the driver of the other car came back on the scene."

A.....he did make some statement to the effect that it was his fault, that he had made a left turn from the wrong lane, that he was in error..."(Appellants' note.. this answer refers to driver of third auto)

...Q. Did you see a car swing around and make a left turn?

A. No.

EXCERPTS FROM DEPOSITION
OF WIDOW OF DRIVER OF
THIRD AUTO

Q..When were you first aware that an accident had happened?

A. When I heard a crash.....

Q. He made a left turn at that point?

A. Yes.

Q... Into Pennsylvania Avenue?

A. Yes...

Q. And then what did he do?

A. He circled around and came back to the scene.

(d) Excerpts From Transcript Of Argument On Motion For Summary Judgment: Statements By Defendant's Counsel (Judicial Admissions)

The following statements were made at the arguments before Judge Gasch and are presented here for two reasons, First, that they represent admissions by the defendant as to the defendant's position, and Secondly, that they represent a summary of the facts, omitting of course the conclusions of lack of liability which defense counsel draws from these facts. The statements below should leave no doubt that the following facts were true:

1. Millikan was about a car length behind Curtis (page 11, line 14)

2. Millikan did not see the Woltz car, which cut in front of Curtis, even though it was in front of and slightly to the right of Millikan. (page 13, line 2,3)

3. The Woltz car did in fact cut in front of Curtis and cause him to jam on the brakes in order to prevent an accident between Woltz and Curtis. (page 12, line 14-16, We take the position that there is no liability here; that the entire proximate cause of this accident was the action of this man Woltz.)

4. Millikan had been drinking alcohol before the accident: the proverbial "two cocktails". (page 11,line 3)

Transcript page 10.

THE COURT: I will hear from Mr. McCarthy.

MR. McCARTHY: Your Honor, there is absolutely no

evidence of any necessity to take a taxicab home. Mr. Millikan did testify he and his wife had had their anniversary dinner at Duke Zeibert's and he said he thought he had two cocktails before that dinner. I find that on page -- the early part of his deposition. At any rate, there is certainly no evidence that the man was under the influence to the extent he couldn't drive his car. He only had two cocktails.

Now this case presents many issues of fact. Millikan-s testimony -- and he summarizes it in response to Mr. Curtis's question on page 24 of the Millikan deposition. He states that he was in the lane next to the parked cars and that Mr. Curtis's car was to his right front, either in the next lane of the right or partially in the next lane to the right. He was at that time about a car length behind Curtis. All of a sudden Curtis cut over in front of him, as a consequence of this third car that Mr. Curtis has described, and that when he cut in front of him Millikan hit his brakes and his right front nudged the left rear of the Curtis vehicle. He says it in these words on page 24:

> I was driving in the aforementioned Lane No. 2 of Nineteenth Street, the car to my right front swerved all of a sudden over in front of me and slammed on their brakes. I could not avoid bumping

the car in front of me and so there was contact between the right front of my automobile and the left rear of the car that had swerved into the left lane in my path.

THE COURT: Is that the only contact?

MR. McCARTHY: That is the only contact.

Then he spoke with Mr. Curtis. He said, we both got out of our cars. "He said there was a car on the right of him that had made a left-hand turn and that he was forced to avoid contact with that car."

Mr. Curtis in his deposition corroborates this. Mrs. Kojouharoff corroborates this. This is the situation. We take the position there is no liability here; that the entire proximate cause of this accident was the action of this man Woltz. Unfortunately, Mr. Woltz was killed about a month after this occurrence in another automobile accident. He was decent enough, though, there was no contact between his car and Curtis's car, Woltz sensed that he had set up something -- he was from out of town, incidentally -- circled the block and came back to the scene of this accident and admitted that this was his responsibility. And this, I think, you will find in the deposition of his wife, which is a part of this record.

There are many issues of fact here to be decided by

a jury. He makes great mention of the fact that Millikan said I never saw Woltz. Why would he have to see Woltz? Woltz is over on his right two lanes, on this one-way street. He did say there was a flow of traffic south on Nineteenth Street and west on the Avenue, as they approached it. But he is going along completely properly and all of a sudden Mr. Curtis is forced to swerve into his lane and this very minor tapping occurs.

This presents issues of fact, Your Honor, and I submit that summary judgment is wholly inappropriate based upon these depositions.

THE COURT: Have the depositions been filed, gentlemen?

MR. McCARTHY: Yes, sir. Everyone has been deposed.

THE COURT: I think probably the best thing the Court can do is to look at the depositions. I haven't read the depositions. And I will let you gentlemen know.

MR. CURTIS: Your Honor, may I address the Court for just a moment?

THE COURT: Surely.

MR. CURTIS: Your Honor, based on the admission of Mr. McCarthy here, his allegation that Woltz was solely responsible for the accident, I move to strike his cross-claim

against me, that I was contributorily negligent.

THE COURT: You wish to file a motion to be taken up in due course?

MR. CURTIS: Yes.

Now, Your Honor, just this one thing, if I may. Another thing, I spoke with Mrs. K last night and I have her authority to waive a jury. She is a very fine old lady and I don't want to subject her to these tensions. That is what this is all about. I have worked four years on this case. I finally shook the other fellow out of the case so that he paid us. I was hoping we could do the same thing with this fellow, just by the hard work a lawyer can do to bring to the Court there is no issue of fact. I don't want to subject this lady, if I can, to the rigors of a trial.

THE COURT: I can appreciate that. Of course on a motion for summary judgment what the Court must satisfy itself is there is no issue of fact.

MR. CURTIS: Can we stipulate to waive the jury in this case, Mr. McCarthy? I have my client's authority for it.

MR. McCARTHY: I will have to get mine.

THE COURT: Very well, gentlemen. I will look at the transcripts and I will let you know.

As far as waiver of jury is concerned, that is a

(e) Traffic Regulations In Force.

The following traffic regulations were in force at the time of the accident:

FAILURE TO GIVE FULL TIME AND ATTENTION

Section 99(c). An operator shall, when operating a vehicle, give his full time and attention to the operation of the same.

FOLLOWING TOO CLOSELY

Section 33. The driver of a vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.

DRIVING UNDER THE INFLUENCE OF INTOXICATING LIQUOR OR DRUG

Section 20. No individual shall while under the influence of any intoxicating liquor or narcotic drug operate any vehicle in the District of Columbia.

SPEED RESTRICTIONS

Section 22(a). No person shall drive a vehicle on a street or highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the street or highway in compliance with legal requirements and the duty of all persons to use due care.

Section 22(c). The driver of every vehicle shall, consistent with the requirements of (a) drive at an appropriate reduced speed when approaching and crossing an intersection or railway grade crossing when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, and when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions.

(f) Court Interpretations

In Johnson v. D. of C. 137A 2d 567, the Court said that failure to give full time and attention may be inferred if a motorist fails to see another vehicle which is there to be seen. See also Sanderson v. U.S. 125 A 2d 70 (motorist strikes pedestrian); Reiners v. Washington & G.R.R., 9 App. D.C. 19 (motorman, looking the other way, strikes child on the tracks); Frost v. Hays, 146 A 2d 907 (Traffic Regulations), and Zeigler v. District of Columbia, 71 A 2d 618 (same), and Wohlstetter v. Capital Transit Co. 62 A 2d 797 (same).

(g) Argument: The Defendant Millikan was Negligent As A Matter Of Law

Both defendant and his counsel admitted that Millikan was to the rear and slightly to the left of the Woltz car on a one way street, and that Millikan did not see the Woltz car at all until AFTER it had cut in front of Curtis' car and made a left turn into Pennsylvania Ave., thus making it necessary for Curtis to slam on his brakes in order to avoid a collision with Woltz.

This failure to see what was almost directly in front of him, was negligence as a matter of law. A driver has a duty to see what is in front of him, and failure to see same is negligence. Price, to the use of National Retailers Mut. Insurance Co. v. Derrickson, 89A 2d 231 (D.C. Municipal App. 1952) it was held that the primary duty to exercise due care to avoid a collision as between motorist ahead and motorist following, lies with the following motorist.

The following cases are collected for the Court's information.

The failure of a driver to maintain a proper lookout and to see what he could and should have seen on approaching or traversing a street intersection, may constitute negligence as a matter of law. Clibon v. Wayman, 137 Colo 495, 327 P2d 283.

Failure to keep a proper lookout is negligence and the duty of maintaining a proper lookout requires not only the physical act of looking with reasonable care, but reasonably prudent action to avoid the danger which a proper lookout would disclose. If the driver of a vehicle looks and does not see what a reasonably prudent person would have seen under the circumstances in time to take the necessary precautions to avoid danger, he is just as guilty of negligence as if he fails to maintain any lookout. Matthews v. Hicks, 197 Va. 112, 87 SE 2d 629.

A motorist who fails to see what is in plain sight while operating a motor vehicle is guilty of improper lookout... Briggs Transfer Co. v. Farmers Mutual Automobile Insurance Co. 265 Wis. 369, 61 N.W. 2d 305.

The operator of a motor vehicle is bound to anticipate the presence of other vehicles and persons on a highway, and to maintain at all times a proper lookout for them. The duty becomes more strict as the presence of others actually exists or becomes more probable. Hill v. Day, 39 Del 400, 199 A.920.

The duty of lookout implies the duty to see that which is in plain sight, unless some reasonable explanation is offered. Hill v. Day, 39 Del 400, 199 A 920.

To look in such a manner as not to see what must plainly be visible is of no more effect than not looking at all. Werner v. Schrader, 127 Colo. 523, 258 P2d 766.

When speaking of "proper lookout" in connection with the operation of a motor vehicle upon the highway, the common conception thereof is the duty of seeing that which is clearly visible or which in the exercise of ordinary care would be visible. However, the courts have defined "proper lookout" in broader terms: "Proper lookout means being watchful of the movements of one's own vehicle as well as the other things seen or seeable, and involves the care, prudence, watchfulness and attention of an ordinary, careful and prudent person under the circumstances." Ritter v. Andrews Concrete Products & Supply Co., (Iowa) 93 NW 2d 787.

The duty of the driver of a motor vehicle to keep a proper lookout at all times, the extent of the observation being dependent on the conditions and circumstances then existing, includes the obligation to keep a vigilant lookout for such vehicles even as may be negligently on the highway, such as in the wrong lane of traffic. Thus, whether the driver of a bus proceeding uphill was negligent in failing to keep a proper lookout and observe a truck skidding toward the bus on the

wrong side of the road, and whether, after observing, he should have slowed down or turned off, is for the jury to determine. DeGraw v. Kansas City & Levenworth Transp. Co. 170 Kas. 713, 228 P2d 527.

The law of the road is that the automobile in front has the superior right to the use of the highway for the purpose of leaving it on either side to enter intersecting roads and passageways, and the traveler behind must, in handling his car, do so in recognition of the superior right of the traveler in front. Madison-Smith Cadillac Co. v. Lloyd, 184 ARK 542, . 42 SW 2d 729.

His duty requires that he look in all directions and observe movement of other cars that either are on the highway, or are entering the highway. Paquin v. Boston & T Transp. Co., 69 RI 176, 32 A2d 153.

It is the duty of the driver of a motor vehicle not merely to look, but to keep an outlook in the direction of travel; and he is held to the duty of seeing what he ought to have seen.....The primary obligation is to keep a proper lookout in the direction of travel. Jones v. Schaffer, 252 NC 368, 115 SE2d 105.

Under the doctrine of Ross v. Hartman, 78 U.S. App., D.C. 217, 139 F.2d 14, 158 A.L.R. 1370, certiorari denied 64 S. Ct. 790, 321 U.S. 790; 88 L.Ed. 1080, it was held that violation of an ordinance intended to promote safety is negligence, and if by creating hazard which ordinance was intended to avoid it brings about harm which ordinance was intended to prevent, it is a legal cause of the harm.

And, it has been held in this jurisdiction that a person charged with ordinary care is under an obligation to apply such care to all situations, foreseen and unforeseen, and is not excused from all errors of judgment in an emergency by the fact that he is compelled to act immediately upon the sudden happening of an event.--Grober v. Capital Transit Co., 119 F. Supp. 100.

Millikan did not see, and therefore he failed to give full time and attention to the vehicle which he was operating, as required by Section 99(c) and he was thus negligent. Since his failure to see led to his crashing into the rear of Curtis' car, it was the proximate cause of the accident and thus rendered Millikan liable as a matter of law. This case falls squarely within the borders of Ross v. Hartmann, cited above. It is to be borne in mind that Woltz was to the right and some in front of Curtis,(please continue next page)

and Curtis saw and avoided Woltz. For the use of the same ordinary attention to his driving, Millikan could have avoided the Curtis car.

Section 33 relates to following too closely. Defendant admits, as shown above, that he was about a car length behind Curtis, and states that he was not able to prevent his car from rear ending Curtis. This set of circumstances falls clearly within the case of United States v. Morrow, 1950, 87 U.S.App.D.C. 84, 182 F. 2d 986, which holds that ANTECEDENT NEGLIGENCE of a certain character, which deprives the defendant of a chance to prevent the accident, places the responsibility on him. Millikan by following as closely as he did failed to leave himself enough room to comply with the meaning of Section 33, and Section 22(a). These antecedent actions set the stage for the accident, and combine with his failure to see the Woltz car to produce the accident.

In Denying The Motion The Court Failed To Consider Reaction Times And Allowance For Breaking Or Stopping Distance As Part Of Following Too Closely.

Courts have taken, in other cases, judicial notice of the fact that if a driver is following too closely he has not left room for the time which he needs to react and apply his brakes, and he has not left enough distance in which to stop his car after applying his brakes, following his reaction time. See 84 ALR2d 979, ANNO: Judicial notice of drivers' reaction time and of stopping distance of motor vehicles traveling at various speeds. This Court has recognized that there must be some passage of time before the body can respond to

the mind's perception of danger in the matter of a moving vehicle, Albaugh v Pennsylvania R. Co. (1954, DC Dist Col) 120 F Supp 70, affd 95 App DC 82, 219 F2d 764.

By driving his car approximately one car length behind the Curtis car, as both Millikan and his counsel admitted, Millikan left himself no reaction time and no br aking time in the event of the type of situation which are sought to be guarded against in Section 33, FOLLOWING TOO CLOSELY, and 22A, the latter of which states, '

> "In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the street or highway in compliance with legal requirements and the duty of all persons to use due care."

No more was asked of Millikan by the law than was asked of Curtis. Curtis by devoting full time and attention was able to see and avoid an accident with the Woltz car, which was to his right and somewhat forward. Millikan had he given full time and attention would have been able to avoid rear ending Curtis' car which was to the right slightly and a carlane in front of Millikan's car according to Millikan, and directly in front of Millikan's car according to Curtis and Mrs. Kojouharoff.

Defendant's right to a trial did not include the right to try a case on liability when in fact there was no issue of liability with which to confront a jury. The exact purpose of FRCP #56 is to prevent the kind of miscarriage of justice which happened in this case, and would happen in others where matters which are clear as a matter of law are offered to juries to be decided as issues of fact.

There was thus no issue to be decided by the jury but the issue of damages, and it was error to deny the motion for summary judgment on the issue of liability.

ARGUMENT

No. 2

IT WAS ERROR TO DENY THE MOTION OF ARTHUR S. CURTIS TO STRIKE THE CLAIM AGAINST HIM OF CONTRIBUTORY NEGLIGENCE.

Following the statement by Defendant's Counsel before Judge Gasch to the effect that the position of Millikan was, that Woltz was solely responsible for the accident, Curtis moved to strike the claim of contributory negligence. The basis for this was judicial admissions. This motion was denied by Judge McGarraghy in an order dated July 5, 1966, found at page 101 of the record.

ARGUMENT

No. 3

IT WAS ERROR TO VACATE THE DEFAULT WHICH WAS GRANTED TO CURTIS BECAUSE MILLIKAN FAILED FOR FIVE YEARS TO FILE AN ANSWER TO THE COUNTERCLAIM.

This matter has been taken up on motion before this Court and is mentioned here in order to preserve the point. The arguments made on the motion are incorporated here by reference.

ARGUMENT

No. 4

THE TRIAL COURT ERRED IN DENYING MOTIONS FOR NEW TRIAL BASED UPON THE AFFIDAVITS OF JAMES F. DOUD.

The affidavits of Mr. Doud, an attorney and member of the Bar are included in the appendix. They show that Mr. Doud interviewed two members of the jury after the verdict and obtained statements. These statements, made orally since the jurors would not sign their statements, show conclusively that the jury made improper deliberations,

arrived at improper conclusions, disregarded the Court's instruction, and was motivated by passion and prejudice. Two main points arise from these affidavits. First the female Plaintiff did not receive a verdict because she was dead and the jury believed it was not necessary to give her a verdict since dead people did not need money. Secondly, she did not receive a verdict because the jury feared that her attorney, the Executor, would get some of the money. A third conclusion arises also, that the jury did not want to have Curtis get any money at all, regardless of merits, and while there is no overt explanation as to why, it is not unreasonable to conclude that in his final argument the Defendant's Counsel improperly raised a cloud of prejudice which could not be overcome. (See quotations in next point.)

ARGUMENT

No. 5

THE TRIAL COURT ERRED IN DENYING THE MOTION FOR NEW TRIAL FILED BY MR. OLENDER.

Mr. Olender's motion is included in toto below with points and authorities.

PLAINTIFF'S MOTION FOR NEW TRIAL

Plaintiffs, through counsel, respectfully move the Court for a new trial, and state as reasons therefor as follows:

1. Defense counsel's closing argument was improper.

2. Instruction to the jury regarding prior claims of plaintiffs was improper.

3. Statement of defence counsel should have been admitted as a judicial admission.

4. And such further reasons as may be advanced at oral argument hereon.

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFFS' MOTION FOR NEW TRIAL

1. DEFENSE COUNSEL'S CLOSING ARGUMENT WAS IMPROPER.

Defendant's counsel repeatedly expressed what was purportedly his opinion that plaintiff Arthur S. Curtis, witness Dr. Herzmark, and plaintiffs' counsel Jack H. Olender, were all dishonest. This was improper under the case law and under the Canons of Ethics, as quoted below. Although most of defense counsel's argument was dedicated to the proposition that plaintiff and those connected with plaintiff's case were dishonest, the following excerpts were the most explicit:

> "Are you being put up? Is this a doctor-lawyer combination trying to put one over on us? Or does this mean what it says?
>
> "I urge you to ask for these exhibits and take them into the jury room with you and look them over yourself. Then you will have some appreciation of the gross exageration, and that may be a kind word--
>
> MR. OLENDER: I object--
>
> MR. McCARTHY: That has gone on here for the past five days--
>
> MR. OLENDER: Objection, Your Honor, under the case of Olenin vs. Curtin and Johnson and I ask the Court to reprimand counsel for characterizing this as gross exageration.
>
> THE COURT: Overruled.
>
> MR. McCARTHY: Owerruled, Your Honor?
>
> THE COURT: Yes.
>
> (Transcript, page 12)
>
> "Mr. Olender and Mr. Curtis, both members of this Bar, should be well aware of the principle that when a lawyer calls a witness to testify on behalf of his client he is in fact saying to the Court, 'I proffer to you witness A who has something relevant to contribute to the issue being tried and I vouch for his credibility.'

> The evidence will clearly support that Dr. Herzmark's credibility has been attacked and is indeed suspect. Did they know? Why did they not know?
>
> They should have known. It is their obligation to know. Two lawyers:
>
> They did not attempt to conceal anything from us? They concealed that report. If it was not in this file I would not have known about it.

CANONS OF PROFESSIONAL ETHICS, No. 15, which reads in part, "It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause," is the basis for the Court's language in ALICE OLENIN V. CURTIN & JOHNSON, INC., United States Court of Appeals for the District of Columbia Circuit, No. 21,104, Decided November 27, 1968:

> "While, on the whole record, counsel's closing argument to the jury does not warrant reversal, it calls for comment. Defense counsel argued that one of plaintiff's witnesses 'told a lie, that he committed perjury on the stand....' We occasionally have found it necessary to remind counsel of the elementary rule, stated in the Canons of Ethics and interpretive opinions[1] (ABA CANONS OF LEGAL ETHICS NO. 15. See also H. DRINKER, LEGAL ETHICS 147 (1953) which forbids an advocate from arguing to the jury his opinion or his appraisal of the issues, of the evidence or of the credibility of witnesses. It is unprofessional conduct, meriting discipline by the court, for counsel either to vouch for his own witnesses or to categorize opposing witnesses as 'liars'; that issue is for the jury. The frequency of violations of this basic precept suggest the need for trial judges to take steps to discipline lawyers who violate it. The bar should hereafter be on notice in this respect. See, e.g., Harris v. United States, No. 21,392 (D.C. Cir. Sept. 17, 1968)."

The instant case goes beyond the Olenin case. Here, defense counsel's argument was devoted to poisoning the jury's minds against plaintiff Curtis, witness Dr. Herzmark, and counsel, Olender. Plaintiff's counsel kept his arguments within the bounds of propriety and plaintiff should not be penalized for it.

The only remedy to plaintiff is a new trial.

II. INSTRUCTION TO JURY REGARDING PRIOR CLAIMS OF PLAINTIFFS WAS IMPROPER.

No cases have been found in the District of Columbia approving a "prior claims" instruction such as was given by the Court, where, as here, there was evidence of only one prior claim for personal injuries by each of the two plaintiffs. Defense counsel led the Court into error in pressing for the instruction which was highly prejudicial in light of defense counsel's personal attack on his opponents.

III. STATEMENT OF DEFENSE COUNSEL SHOULD HAVE BEEN ADMITTED AS JUDICIAL ADMISSION.

It is submitted that plaintiff should have been permitted to introduce into evidence defense counsel's statement at a prior hearing that Woltz was the sole cause of the accident, as it related to the defense that plaintiff was negligent.

Respectfully submitted,

Jack H. Olender
Attorney for Plaintiff

ARGUMENT

No. 6

THE COURT ERRED IN HOLDING THAT CURTIS COULD NOT PARTICIPATE IN THE TRIAL AS A LAWYER.

Appellant has already filed a Motion on this point, and incorporates that motion here so that it may be argued orally. However, to save the Court the inconvenience, Counsel repeats some of the material here. Basically, this argument is as follows:

1. Curtis had been the only lawyer in the case for seven years prior to trial.

2. The death of the female plaintiff left Curtis as the only eye witness for the plaintiffs.

3. Curtis employed Mr. Jack Olender to assist him in the trial of the case, since it was not possible to sit on the stand and ask himself questions without causing the case to lose authenticity and dignity.

4. At the trial, the court held that only one counsel could represent both plaintiffs.

5. The more experienced counsel in this case, Curtis, was thus disqualified since a lawyer was needed to ask him questions.

6. Despite the great abilities of Mr. Olender, and his hard work, he was not effective as is shown by the affidavits of James Doud. Therefore the ruling of the Court to which Curtis objected was prejudicial. Since there were two plaintiffs each was entitled to a lawyer and under the circumstances a different ruling should have been made.

ARGUMENT

No. 7

APPELLANTS INCORPORATE BY REFERENCE THEIR MOTIONS FILED IN THIS COURT PRIOR TO THE FILING OF THIS BRIEF.

CONCLUSION

The Motion for Summary Judgment filed by the Plaintiffs should have been granted on the issue of liability. The Motion for Judgment on the Default filed by Curtis should have been granted since Millikan had waited five years to file. The Motions for New Trial should have been granted.

The Case should be reversed and sent back for a trial on the issue of DAMAGES ONLY.

And for such other or further relief as this Court deems proper.

Respectfully submitted,

Arthur S. Curtis
Counsel for Appellants
816 National Press Building
Washington, D. C. 20004

APPENDICES

Appendix p. 1

EXCERPTS FROM MILLIKAN(MR.)
DEPOSITION OF DEC.6 , 1963
beginning a t R,74

A refers to answer of Mr. Millikan. Q refers to question. ...refers to material deleted, between answers.

Q. Y ou were with Mrs. Millikan, I take it?

A. That is right. May the 25th was our wedding anniversary.

...

Q. I expect I had a cocktail or two before dinner...

A. No, I didn't notice any cars out on another lane. I was informed of a car being on the outside lane later on...

A. I saw it after it had made a turn...

A. It's a one way street...I was in lane No.2.....

A. I was driving in the aforementioned Lane No.2 of 19th Street, the car to my right front swerved all of a sudden over in front of me and slammed on theit brakes. I could not avoid bumping the car in front of me and so there was contact between the right front of my automobile and the left rear of the car that had swerved into the left lane in my path, and the driver of the other car, Mr. Curtis, and myself both got out of the car and I asked Mr. Curtis why he swerved over into my lane and threw on his brakes.

" He said there was a car on the right of him that had made a lefthand turn and that he was forced to avoid contact with that car.

"At that time Mr. Curtis then said that he thought he had the license number.....then the driver of the other car came back on the scene."

(Continued)

A.....he did make some statement to the effect that it was his fault, that he had made a left turn from the wrong lane, that he was in error..."(Appellants' note.. this answer refers to driver of third au to)

...Q. Did you seeeaaccar swing around and make a left turn?

A. No.

EXCERPTS FROM DEPOSITION
OF WIDOW OF DRIVER OF
THIRD AUTO

Q..When were you first aware that an accident had happened?

A. When I heard a crash.....

Q. He made a left turn at that point?

A. Yes.

Q... Into Pennsylvania Avenue?

A. Yes...

Q. And then what did he do?

A. He circled around and came back to the scene.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA
WASHINGTON 20001

3.

EDWARD M. CURRAN
CHIEF JUDGE

June 10, 1968

Exhibit
C.A. 3995-62

Arthur S. Curtis, Esquire
National Press Building
Washington, D.C. 20004

Dear Mr. Curtis:

I acknowledge receipt of your letter dated May 31, 1968, with respect to dismissal of your cross-claim against the third-party plaintiff in C.A. 3995-62, Kojouharoff v. Woltz, and operation of what you refer to as Rule 60.

Your cross-claim was dismissed under Local Rule 13(a), which provides in part:

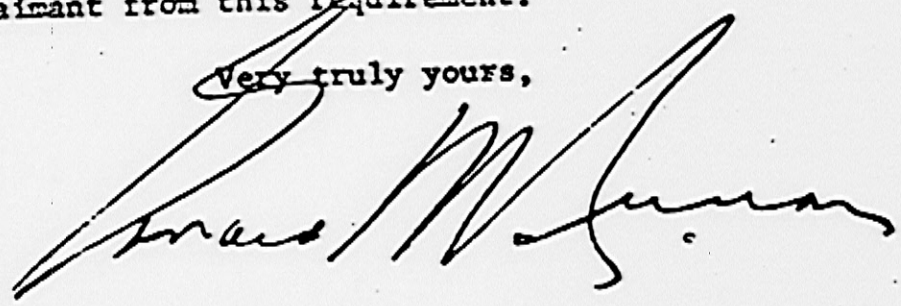
> "(a) DISMISSAL WITHOUT PREJUDICE ...If a party seeking affirmative relief fails for six months from the time action may be taken to comply with any law, rule or order requisite to the prosecution of his claim, or to avail of a right arising through the default or failure of an adverse party, or to take other action looking to the prosecution of his claim ...the complaint, counterclaim, cross-claim, or third-party complaint of said party, as the case may be, shall stand dismissed without prejudice..."

In this case, your cross-claim on the third-party complaint was filed on February 14, 1963, served by mail on defendant Millikan on February 11, 1963, and no answer was filed by said defendant. After numerous extensions of Rule 13, the Clerk on May 22, 1968, entered the cross-claim dismissed without prejudice as of July 3, 1967, the latter date being six months after the last extension.

The same rule would have been applied had there been no answer to a complaint, counterclaim, or third-party action six months after service, with no action by the party seeking affirmative relief to have a default entered for failure to answer.

The rationale of Rule 13 which certainly is not unreasonable, is that the burden is on the party seeking relief to prosecute his claim. There appears to be no good reason to exempt a cross-claimant from this requirement.

Very truly yours,



5.

DEFAULT
ON CROSS-COMPLAINT

HERMAN A. MILLIKAN
defendant and third-party plaintiff,/

It appearing that the above-named ~~defendant~~ has failed to plead or otherwise defend the cross-complaint of third-party defendant, Arthur S. Curtis in this action though duly served with ~~summons and copy of the complaint on the~~ a copy of the cross-complaint by mailing on the 11th day of FEBRUARY, 1963, and an affidavit on behalf of the ~~plaintiff having~~ third-party defendant having been filed, it is this ~~6th~~ day of June, 1968

declared that HERMAN A. MILLIKAN

and Third-Party Plaintiff
defendant herein is (~~are~~) in default. on the said cross-complaint of Arthur S. Curtis, third-party defendant.

ROBERT M. STEARNS, *Clerk,*

By _____
Deputy Clerk.

I hereby certify that I have mailed a copy of the above Default on Cross-Complaint to Joseph S. McCarthy, Esq., 745 Washington Bldg., N.W., Washington, D.C., this 6th day of June, 1968.

ROBERT M. STEARNS, Clerk
By _____
Deputy Clerk

124

-MOTION FOR JUDGMENT ON DEFAULT WITH EX PARTE HEARING ON DAMAGES

Arthur S. Curtis moves this Court, under F.R.C.P. 55(b), to enter a judgment in his favor on the issue as to liability as against Millikan, based upon the default, and to order a hearing ex parte, with a jury, to determine the issue of damages.

MOTION TO STRIKE THIRD PARTY COMPLAINT

Arthur S. Curtis also moves this Court to strike the third party complaint against him filed by Millikan for the reason that, since the Court has entered a judgment (default , by the Clerk) in favor of Curtis and against Millikan, then there can not be a judgment in favor of Millikan and against Curtis in the same case in a tort case arising out of the same circumstances, and Millikan is estopped to go forward with his claim as to negligence by Curtis. Were Millikan, for example, to prevail, this would lead to a result that each would pay the other for their negligences while under these circumstances the law holds that contributory negligence bars payment. Thus where the Court Clerk has entered up a default, on the counterclaim of Curtis against Millikan, the complaint of Millikan must be striken.

MOTION OF EDITH C. KOJOUHAROFF FOR A JUDGMENT ON ISSUE OF LIABILITY AS TO HERMAN A. MILLIKAN

Edith C. Kojouharoff moves this Court to strike the defenses of Herman A. Millikan and enter judgment for her on the issue of liability.

The default entered in favor of Curtis, driver of the auto in which she was passenger, collaterally estops Millikan from pleading his defense that he was not negligent as to Mrs. Kojouharoff. If Millikan was negligent as to Curtis, the driver, he was also negligent as to the passenger, Mrs. Kojouharoff. The default holds that Millikan was negligent as to Curtis.

1. Motion of Arthur S. Curtis for Judgment on issue of liability based upon default, with trial as to damages, as to Herman A. Millikan, ex parte; Motion to strike third party complaint.

2. Motion of Edith C. Kojouharoff for judgment as to liability as against Herman A. Millikan, with trial as to damages

Important Facts in this Case

Mrs. Kojouharoff, a retired D.C. teacher who will be 80 on June 9,1968, was a passenger in an auto driven by Arthur S. Curtis, on a one way street. Following Curtis' auto was one driven by Millikan. To the right of Curtis and travelling in the same direction , was Woltz's auto. Suddenly Woltz veered to the left and in the direction of Curtis's auto. Curtis swung his auto to the left and braked heavily, avoiding collision with Woltz. But Millikan rearended Curtis' auto. On deposition Millikan admitted he had been drinking and that he had not even seen Woltz's auto which was in front of him and to the right.

Mrs. Kojouharoff sued Woltz and Millikan, through her counsel, Curtis. Millikan brought in Curtis as third party defendant. Curtis now answered and filed a counterclaim against both Woltz and Millikan. The case against Woltz has been disposed of, as to Mrs. Kojouharoff and Curtis. Millikan failed to answer, altho the counterclaim of Curtis, designated Cross-Complaint, was filed 11 February 1963. In 1967 Curtis' Cross-complaint was dismissed for failure to take a default. On 5 June 1968 the Cross-complaint was reinstated by order of this Court. Curtis on 6 June 1968 took default against Millikan. This default was entered by the Clerk.

OFFICES:
R S. CURTIS
PRESS BUILDING
STON 4, D. C.

ROBERT M. STEARNS, Clerk

8

OPPOSITION TO MOTION TO VACATE DEFAULT AND FOR LEAVE TO FILE ANSWER

Arthur S. Curtis opposes the motion to vacate the default and request for leave to file an answer filed by Herman A. Millikan, and respectfully moves this Court to deny same under the rule of Draisner v Liss Realty Co.,(CADC 1954), 211 F 808, 19 FR Serv 55 c.1, which held that three years was too long to wait to file an answer. Millikan has gone more than five years without filing an answer.

POINTS AND AUTHORITIES

1. Under the F.R.C.P., 14, Third Party Practice, a claim by a third party defendant against a third party complainant is a counterclaim and follows the same rules provided in FRCP 12,13. See F.R.C.P. 12,13,14.

As shown in the attached letter from Chief Judge Curran, Curtis filed his third-party complaint on February 14,1963, and served it by mail upon Millikan on February 11,1963, and no answer was filed by Millikan. After numerous extensions under Rule 13, Curtis' cross-claim was dismissed for failure to take a default, and was reinstated upon motion. See Judge Curran's letter. Thus the taking of the default by Curtis was not only proper, but was absolutely necessary. It should not, therefore, be vacated.

2. Under Draisner v Liss Realty Co., (CADC 1954) 211 F 808, this Court should not permit the filing of an answer now by Millikan. In Draisner, our Court of Appeals held that good cause was not shown where a defendant waited three years to take action. Here, Millikan has waited more than five years.

Certificate: I have this 20June 1968 mailed postage prepaid a copy of this pleading to Joseph McCarthy, 1701 KNW D.C.

Respectfully,

Arthur S. Curtis, Att'y. pro se
816 National Press Bldg. D.C. 20004
Na8-5696

FICES:
CURTIS
SS BUILDING
ON 4, D. C.

...ERT M. SLEMAKER, CLERK 9

MOTION TO STRIKE
ANSWER TO COUNTERCLAIM

Counterclaimant respectfully moves this Court to strike the Answer filed by Herman A. Millikan for the following reasons:

1. That this personal injury suit was filed in 1962.

2. That Arthur S. Curtis was joined as a third party defendant, and filed a timely counterclaim.

3. That Millikan failed to file an answer to the counterclaim.

4. That because he did not take a default, Curtis' counterclaim was dismissed in 1968.

5. That upon motions, the counterclaim was reinstated, and thereupon Curtis took a default.

6. That Millikan's attempt to file an answer now is no longer timely and that he does not show good cause since he is more than five years late. One defense he makes for example is that the other original defendant, Woltz, is responsible for the accident. Woltz has died in the meantime and the case against him has been dismissed reserving the rights of Mrs. Kojouaroff and Curtis against Millikan.

7. That our Court of Appeals has held that one who waits three years to attempt to file an answer has not shown good

OFFICES:
S. CURTIS
RGS BUILDING
TON 4, D. C.

cause and that he will be denied leave to file. Draisner vs. Liss Co, (CADC), 211F 808.

8. That under the rule of Draisner vs. Liss Co., (CADC), this court cannot permit Millikan to file his answer to the counterclaim and must grant the motion to strike. If Millikan is to have leave to file, only our Court of Appeals can grant it.

Respectfully,

Arthur S. Curtis
816 National Press Building
Washington, D. C. 20004

Certificate: This is to certify that I have mailed, postage prepaid, a copy of this Motion to Strike to Joseph S. McCarthy, Ring Building, Washington, D. C.

29 July 63

Arthur S. Curtis

The undersigned James Doud, being first duly sworn, states:

1. That on 2/3/70 at about noon I went to the Library of Congress Annex, where I spoke to David Littlefield, who, to my personal knowledge, was the jury foreman in the above entitled case

2. That I stated to him that an attempt was being made to reevaluate the plaintiff's legal position from the standpoint of a new trial. I then asked him why the jury had given no award to Mrs. Kojouharoff, the woman. He replied:

"Because she was dead and we felt that a living person shouldn't have to give something to a dead person."

3. Mr. Littlefield stated that he would not sign any statement. He also said that he would now have to contact the lawyer on the other side to tell him that he had spoken to me, as he had done in the past. Previously, he stated, he had called Mr. McCarthy's office and spoken to his partner about the case.

4. I am a practising member of the Bar of the District of Columbia. I have no financial interest in the outcome of this case.

ROBERT M. SHARP, Clerk

Subscribed and sworn to before me, this 3rd day of Bebruary 1970. My commission expires May 14, 1974

Mary F. Littlefield Notary public, DC

Certi ficate:

I have this 3rd Feb. 1970 mailed postage prepaid a copyy of this Affidavit to Jos. McCarthy, 641 S. Washington, DC.

P

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AFFIDAVIT OF JAMES F. DOUD

The undersigned James F. Doud, being first duly sworn states that the following is true to his best knowledge and belief.

1. That I am a member of the Bar of the District of Columbia and that I have no financial interest in the outcome of this case;

2. That on March 4, 1970, I James F. Doud contacted Roger Young at the United States Department of Labor where he is employed and presented certain oral interrogatories to him;

3. That in response to an interrogatory, as to why the jury did not find affirmatively for Mrs. Kojouharoff, the female passenger in the car of Mr. Curtis, Mr. Roger Young, who identified himself as a member of the jury in the case, replied: "We did not give the woman anything because it would go to Mr. Curtis." He stated that the jury reached this conclusion as a result of what they understood the Judge to tell them;

4. That this was the understanding of the entire jury;

5. I asked Mr. Roger Young, would he please sign his name to the answers which he had just given to the questions that he was asked. He replied in the negative.

James F Doud

Subscribed and sworn to before me this 4th day of March, 1970.

My commission expires May 14, 1974

Mary F Schmidt
Notary Public D.C.

p. 12, Appendix

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ARTHUR S. CURTIS, Executor of the Estate of Mrs. Edith C. Kojouharoff and ARTHUR S. CURTIS, individually	)	
Plaintiffs	)	
vs.	)	C.A.NO. 3995-62
HERMAN A. MILLIKAN	)	
Defendant	)	

Washington, D. C.

September 18 1969.

The trial of the above-entitled matter came on for hearing before THE HONORABLE JOSEPH C. WADDY, UNITED STATES DISTRICT JUDGE, at 3pm.

APPEARANCES:

ON BEHALF OF THE PLAINTIFFS:

Jack Olender, Esq., Arthur S. Curtis, Esq.

ON BEHALF OF THE DEFENDANT:

Joseph S. McCarthy, Esq.,

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P R O C E E D I N G S

THE DEPUTY CLERK: The case of Arthur S. Curtis Executor of the Estate of Mrs. Edith C. Kojouharoff, and Arthur S. Curtis, individually, versus Herman A. Millikan, Civil Action No. 3995-62.

MR. OLENDER: Ready for the Plaintiffs, Your Honor.

MR. CURTIS: Ready for Plaintiffs, Your Honor.

MR. McCARTHY: Ready for Defendant.

THE COURT: Mr. Olender, you announced that you are ready for the plaintiffs. That means that you are representing both of the plaintiffs.

MR. OLENDER: Yes, that is correct, Your Honor.

THE COURT: Mr. Curtis, you also answered that you were ready for plaintiffs. Who do you represent?

MR. CURTIS: I also represent both plaintiffs, Your Honor.

THE COURT: Which of you will be trial counsel?

MR. CURTIS: It is my intention, Your Honor, that both of us will be trial counsel.

THE COURT: I am ruling that you designate one as trial counsel.

MR. CURTIS: Well Your Honor, then, I designate -- I except to that, but I designate Mr. Olender in the meantime.

THE COURT: I refer to the Rules of this Court, Rule 11-L which says that where more than one attorney represents a party

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one shall be designated as trial attorney when the action is placed on the ready calendar. Certainly, if it should be done when it is placed on the ready calendar, it should be done before trial.

MR. CURTIS: Your Honor, I am aware of the rule. I do not think that the rule, however, has ever been brought before the Court of Appeals subsequently.

THE COURT: Well, maybe it has not, but it has never been changed.

MR. CURTIS: I understand that, Your Honor, but I am simply noting my exception and I designate Mr. Olender as trial counsel.

THE COURT: Mr. Olender, then, you will be trial counsel.

MR. OLENDER: Yes, Your Honor. May I bring up one preliminary matter.

THE COURT: Just one moment -- Mr. McCarthy: you are ready for trial? On behalf of the Defendant?

MR. McCARTHY: Yes, Your Honor.

THE COURT: You are representing him also in the counterclaim?

MR. McCATHRY: Yes, Your Honor.

(Whereupon the trial proceeded to conclusion)

CERTIFIED _____
OFFICIAL COURT REPORTER

BRIEF FOR APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,930

ARTHUR S. CURTIS, Executor of the Estate of Edith C. Kojouharoff (Mrs.), *Appellant*,

and

ARTHUR S. CURTIS, Individually, *Appellant*,

v.

HERMAN A. MILLIKAN, *Appellee*.

Appeal From the United States District Court for the District of Columbia

JOSEPH S. McCARTHY
McCARTHY AND WHARTON
100 South Washington Street
Rockville, Maryland 20850
Attorney for Appellee

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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* Indicates cases upon which appellee principally relies.

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IN THE

United States Court of Appeals

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No. 23,930

ARTHUR S. CURTIS, Executor of the Estate of Edith C. Kojouharoff (Mrs.), *Appellant,*

and

ARTHUR S. CURTIS, Individually, *Appellant,*

v.

HERMAN A. MILLIKAN, *Appellee.*

Appeal From the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

This is an action seeking damages for personal injuries originally filed on behalf of (Mrs.) Edith C. Kojouharoff against the Appellee (defendant below), Herman A. Millikan, and the Estate of one Louis A. Woltz, arising out of

an automobile accident which occurred in the District of Columbia on May 25, 1962. At the time of the occurrence, Mrs. Kojouharoff was a passenger in a motor vehicle owned and operated by Arthur S. Curtis, a member of the Bar of this Court, who filed the suit on her behalf. Appellee filed a Third-Party Complaint, impleading Arthur S. Curtis as the operator of one of the vehicles involved under the provisions of Rule 14, *Federal Rules of Civil Procedure*. After service of process, Curtis thereupon answered the Third-Party Complaint and filed a Cross-Complaint seeking damages for his own alleged personal injuries against Millikan.

This suit was originally filed on December 24, 1962. Two motions for summary judgment on behalf of plaintiff were denied. Trial was held on September 19, 23, 24 and 25, 1969. The jury returned a general verdict in favor of the Defendant Millikan as to all claims on September 26, 1969 and judgment was entered for the Defendant on that date. Two or three motions for new trials were made and denied. An appeal was noted on November 10, 1969 to this Court by the plaintiff, Mrs. Kojouharoff and the third party defendant and cross-claimant, Curtis.*

COUNTER-STATEMENT OF ISSUES

1. Whether the denials of plaintiffs' motions for summary judgment are reviewable by this court?

2. Whether, assuming arguendo, the denials are reviewable and not moot, the lower court was correct in overruling said motions?

3. Whether assertions made in open court by defendant's counsel during argument on motion for summary judgment can be construed as "admissions" and used against defendant?

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* In this brief, appellants, Mrs. Kojouharoff, the original plaintiff, and Arthur S. Curtis, third-party defendant and cross-complainant, will be referred to as plaintiffs. Herman A. Millikan, appellee, will be referred to as defendant.

4. Whether vacating the entry of a default by the clerk was proper under the circumstances?

5. Whether the jury verdict can be impeached?

6. Whether argument of defendant's counsel in summation was legitimate comment based upon the facts in evidence?

7. Whether counsel who is also a party and the only witness for the plaintiff should be allowed to try the case?

COUNTER-STATEMENT OF THE FACTS*

This action arose from an automobile accident which happened on May 25, 1962, on 19th Street, N.W., in the District of Columbia, involving the actions of three operators of motor vehicles.

Suit was originally filed on December 24, 1962 on behalf of Edith C. Kojouharoff against Herman A. Millikan, the appellee herein, and one George R. Woltz, Executor of the Estate of Louis A. Woltz, deceased. The defendant, Herman Millikan, as a third-party plaintiff, impleaded Arthur S. Curtis, the operator of one of the vehicles involved, into this litigation as a third-party defendant. Curtis then counter-claimed against Millikan for injuries allegedly sustained by him in this accident.

On November 29, 1965, almost three years after suit was filed, the case was entered as settled and dismissed with prejudice by the third-party defendant, Curtis, as against the original party defendant, Woltz.

On October 17, 1968, Arthur S. Curtis, Executor, was substituted as a party plaintiff for Edith C. Kojouharoff, deceased.

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* In appellants' brief, there is included as pages 11-16, Material Facts, and page 17, Disputed Facts, all of which purport in some measure to be a recitation of evidence and events occurring during the trial of this cause. Appellee makes no agreements with reference to these assertions, but rather relies upon the record in this case and its counter-statement of the case.

On September 19, 1969, the case was called for trial before Judge Joseph Waddy and a jury, and the trial continued from day to day until September 26th, at which time the jury returned a general verdict in favor of the defendant, Herman A. Millikan, against the plaintiff, Curtis, as Executor and in favor of the defendant, Herman A. Millikan, against Curtis individually, as a third-party defendant.

During the pendency of the suit from 1962 to 1969, a Motion for Summary Judgment was filed on behalf of the plaintiff, Edith Kojouharoff, which Motion was denied by Judge Gasch on March 31, 1966. Thereafter, appellant Curtis filed a Motion for Summary Judgment on his behalf, upon the third-party complaint, and that too was denied on July 5, 1966, by Judge McGarraghy.

Although no transcript has been provided to this Court by appellant so that the testimony of witnesses on the issue of legal liability could be demonstrated, the Court should be informed that this was basically a routine motor accident. The vehicle of Louis Woltz, who died from other causes prior to the filing of this suit, was proceeding southbound in the second lane from the right hand or north curb on 19th Street between "I" and Pennsylvania Avenue (19th Street is 3 lanes one way at this point). Mr. Woltz attempted to change lanes at a time when the third-party defendant Curtis was operating in the lane to Woltz's left and slightly behind Woltz. This movement by Woltz caused Curtis to have to cut over into the lane to his left in which the defendant Millikan was driving, and at the same time, suddenly apply his brakes as a consequence of which, Millikan was unable to stop and the right front portion of his bumper struck the left rear portion of Curtis's car. The impact was described as slight. The evidence presented clear issues of fact on speed, time, distance, opportunity to see and the like and was decided by the jury in its verdict as indicating that there was no negligence on the part of appellee, which was the proximate cause of any injuries or

damages sustained by either Curtis in his representative capacity or individually.

Appellant Curtis called Dr. Maurice Hertzmark to testify to the treatment he rendered to Curtis and to his injuries and damages sustained in this accident. Hertzmark testified on his direct examination that it was his opinion that Curtis had sustained a chronic sprain of his cervical spine, permanent in character, and an aggravation of a pre-existing arthritic condition, causing consistent pain radiating to the left shoulder and upper back. Upon cross-examination, it was developed that Hertzmark had treated Curtis for injuries allegedly sustained in an accident that occurred in November of 1958. The testimony demonstrated that the accident occurring in 1958 resulted in a law suit, Curtis vs. Trathen, Civil Action No. 2824-58, which was ultimately tried in this Court in November, 1967. This official court file in Civil Action No. 2824-58 was offered and received as the defendant, Millikan's Exhibit No. 3 in this case. It was offered and received because there was contained in that Court file, a medical report (Defendant's Exhibit 3a) from Dr. Hertzmark submitted under a covering letter by Arthur Curtis pursuant to the requirements of the pre-trial order in that earlier case and dated June 7, 1963 in which Dr. Hertzmark expressed the opinion that Curtis had sustained in that earlier accident, a chronic sprain of the cervical spine with involvement of the left shoulder and mild arthritic changes. No mention had been made in the direct examination that Dr. Hertzmark had testified that injuries to the very same parts of the body of the very same character had been the basis for opinions he expressed on the question of the permanent injuries sustained by Curtis in the earlier auto accident. Dr. Hertzmark admitted that he testified in person at the trial of *Curtis* v. *Trathen.* Unfortunately, no transcript of his testimony in that action was available. Counsel referred to Dr. Hertzmark's testimony and to defendant's Exhibit #3a in closing argument.

ARGUMENT

I. The Denial of a Motion for Summary Judgment Is Not Reviewable by This Court

It generally has been held that the action of a trial court in denying a motion for summary judgment is not reviewable on appeal from a judgment rendered on a trial of the merits of the case.[1]

In *Home Indemnity Company* v. *Reynolds & Co.*,[2] *the* Court held that even if the motion for summary judgment was improperly denied, the error is not reversible as the result becomes merged in the subsequent trial.

The Kentucky Court of Appeals in an action to recover for personal injuries delved fully into the rationale for this rule and concluded that the denial of a motion for summary judgment is not reviewable after a final judgment on the merits of the case:[3]

> "The Federal courts seem to assume that an order denying a motion for summary judgment is not reviewable because not appealable. (Citations omitted) Clearly such an order, being interlocutory, is not *appealable.* See Clay, CR56-03, Comment 7. However, though not independently appealable, certain interlocutory orders are *reviewable* in conjunction with a final judgment; e.g., an order overruling a motion for a directed verdict; an order granting a new trial. Thus the determination that an order denying summary judgment is not appealable does not necessarily resolve the question of whether such an order may be reviewed when properly presented.
>
> However, we think sound reasoning supports the conclusion that an order denying summary judgment should not be reviewed on appeal.
>
> . . .

---

1 *Boyles Galvanizing and Plating Co.* v. *Hartford Accident & Indemnity Company,* 372 F.2d 310, 312 (10th Cir., 1967); *Dutton* v. *Cities Defense Corp.,* 197 F.2d 458 (8th Cir., 1952); 15 ALR3d 899, 922 etff.

2 38 Ill.App.2d 358, 187 N.E.2d 274, 278 (1962).

3 *Bell* v. *Harmon,* 284 S.W.2d 812 (Ky., 1955).

> Summary judgment procedure is not a substitute for a trial. It is a time saving device. And the motion should only be sustained if the Court is fully satisfied that there is an absence of genuine and material factual issues, and all doubts are to be resolved in favor of the party opposing the motion. (Citations omitted)
>
> The Federal Appellate Courts have recognized the limited scope of summary judgment procedure, and have consistently cautioned trial courts against granting motions for summary judgment if any doubt exists as to the right of a party to a trial. To hold that there may be a review of the trial court's determination that a party is entitled to a trial would be inconsistent with this admonition to proceed cautiously when granting summary judgment. It would put the Appellate Court in the position of trying the question of doubt in the mind of the trial judge. We do not think this would be proper review.
>
> Our refusal to review an order denying summary judgment can in no sense prejudice the substantive rights of the party making the motion since he has the right to establish the merits of his motion upon the trial of the cause. If the contrary were held, one who had sustained his position after a fair hearing of the whole case might nevertheless lose, because he had failed to prove his case fully on an interlocutory motion.
>
> We therefore decline to consider the possible error in the denial of defendant's motion for summary judgment." 284 S.W.2d at 814.

It is submitted that the denial of the motions for summary judgment cannot be reviewed by this court under the applicable law.

II. Assuming Arguendo, the Denial Is Reviewable and Not Moot, the Lower Court Was Correct in Overruling Said Motion.

It would indeed seem that the denial of the motions are moot. The appellants failed to move for a directed verdict in their favor at the conclusion of the evidence.[4] Any right

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[4] It is difficult to refer to the record since appellant failed to have any transcript of the trial testimony transcribed.

plaintiffs had to summary judgment would have merged at the trial of the case and would properly be presented to this Court as an appeal from the denial of a motion for a directed verdict. The failure of plaintiffs to seek such relief at the trial level precludes the consideration of the denial of the motion for summary judgment on appeal, for with the return of a general jury verdict in behalf of the defendant, all issues of fact are ordinarily held to have been decided in favor of the prevailing party.[5] Since there was a general verdict on all issues in favor of the defendant, plaintiff's motions for summary judgment must have merged into that verdict and no longer are a viable entity for this Court's consideration.[6]

However, *assuming arguendo*, that this Court could review the denial of the motion for summary judgment, it must take the view of the evidence which is most favorable to the prevailing party, accepting as established all facts which the evidence reasonably tended to prove and giving to the prevailing party the benefit of all inferences which may be reasonably drawn from the evidence.[7]

Then assuming the issue is reviewable and not merged into the jury verdict, appellants are not entitled to any relief under the substantive law concerning summary judgment. As Professor Moore has said:

> "Here we start with the general proposition that issues of negligence, including such related issues as wanton or contributory negligence, are ordinarily not suscep-

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[5] *Dickens* v. *International Brotherhood of Teamsters, etc.*, 84 U.S.App.D.C. 51, 55, 171 F.2d 21, 25 (1948); *Hart* v. *Capital Traction Co.*, 35 App.D.C. 502 (1910); *Bank of America National Trust & Savings Association* v. *Hayden*, 231 F.2d 599, (9th Cir., 1956).

[6] *Rowe* v. *Safewap Stores*, 128 P.2d 293, 298 (Wash. 1942):

("A general verdict is the integrated final product of the jury's findings, and it cannot readily be separated into its component elements.)

[7] *Bank of America Nat. Trust and Sav. Ass'n* v. *Hayden, supra*, at 602-603.

> tible of summary adjudication either for or against the claimant, but should be resolved by trial in the ordinary manner.[8]"

This is a simple motor vehicle negligence case involving three separate automobiles. The burden of showing the absence of any genuine issue of material fact was upon the plaintiffs and they just failed to meet that burden.[9] Summary judgment would have been wholly inappropriate in this case, and, if granted, would have called for reversal as in *Underwater Storage, Inc.* v. *United States Rubber Co.*,[10] where in reversing summary judgment for the defendant, the Court said:

> "Summary judgment is properly granted where the record establishes that there is no genuine issue as to any material fact concerning a dispositive issue in a case and that the moving party is entitled to judgment as a matter of law. Rule 56(c), Fed.R.Civ.Pro.
>
> The general rule that guides the District Court in the disposition of motions for summary judgment is that the moving party has the burden of showing the absence of any genuine issues as to all the material facts applicable under his theory of law. (citation omitted) Moreover,
>
> > 'One who moves for summary judgment has the burden of demonstrating clearly the absence of any genuine issue of fact, and that any doubt as to the existence of such an issue is resolved against the movant. The courts are quite critical of the papers presented by the moving party, but not of the opposing papers'. 371 F.2d at 953."

Although appellants have not made the testimony at trial part of the record on appeal and rely instead on deposi-

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[8] 6 Moore's Fed. Practice Sec. 56.17 (42), (2d.ed) at 2583.

[9] *Harl* v. *Accacia Mutual Life Ins. Co.*, 115 U.S.App.D.C. 116, 117-119, 317 F.2d 577, 578-580 (1963); *Eves* v. *Buxbaum*, 102 U.S.App.D.C. 334, 253 F.2d 356 (1958); *Dewey* v. *Clark*, 86 U.S. App. D.C. 137, 143, 180 F.2d 766, 772 (1950).

[10] 125 U.S.App.D.C. 297, 371 F.2d 950 (1966).

tions not in evidence, even taking appellants' version of the testimony as credible, there still could have been no error in the lower courts' overruling of the motions for summary judgment. In a similar case to the one at bar, the Fifth Circuit applied the principles set forth above and reversed summary judgment for the defendant.[11] It held that there were genuine issues as to material fact and it was error to grant the motion for summary judgment:

> "In the posture of the case as it was before the District Court and as it is before us, the driver of the rear car was operating it within the speed limit which may or may not have been a negligent speed under the circumstances. She was a car length behind the car of appellants which may or may not have been an unreasonable distance to maintain and hence negligence. (citation omitted) The unexpected and sudden stop of appellants' car might have been such a circumstance as would rebut the presumption against the driver of the rear car. It seems to us, that in the posture of the case as it comes to us, there are or may be questions of negligence, contributory negligence and possibly unavoidable accident. The solution of these questions requires an evidentiary trial. *Gauch* v. *Meleski,* 5th Cir. 1965, 346 F.2d 433. 373 F.2d at 621."

The same considerations apply in the instant case. There were issues of fact that properly should have been submitted to the jury. There was no error in the denial of the motions for summary judgment herein.

III. Assertions Made in Open Court by Defendant's Counsel During Argument on Motion for Summary Judgment Are Not "Admissions" To Be Used Against Defendant.

While it is generally true that "distinct and formal admissions of fact made by counsel during the progress of a civil or criminal trial are binding on the client when made for the express purpose of dispensing with formal proof," [12]

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11 *Dornton* v. *Darby,* 373 F.2d 619, 621 (5th Cir., 1967).

12 7 Am. Jur. 2d, *Attorneys at Law,* sec. 122 at 121; see also, 7 C.J.S. *Attorney and Client,* sec. 100 at 922.

such rule of law refers to a purposeful admission of fact to waive or dispense with formal proof or a deliberate stipulation as to facts for simplification of trial. From the excerpts reproduced by appellant of the defendant's counsel's argument, it is obvious that there was no deliberate and intentional admission of fact meant to bind the defendant at a later stage. As the Court stated in *Humble Oil & Refining Co.* v. *Sun Oil Co.:* [13]

> "Not every statement made by counsel casually, or in the heat of argument, or in colloquy with his adversary, is binding upon his client. It must have been deliberately made for the purpose of being used at the trial as a substitute for legal evidence of the fact." 191 F.2d at 714.

And again as succinctly put by the Missouri Supreme Court in *Kansas City* v. *Martin:* [14]

> "However, the authority of an attorney for such purpose is limited to statements or admissions of fact, and neither the client nor the Court is bound by the attorney's statements or admissions as to matters of law or legal conclusions. 7 C.J.S. Attorney and Client § 100, p. 922. It is also recognized that improvident or erroneous statements or admissions resulting from unguarded expressions or mistakes should not be binding on the client. 7 C.J.S. Attorney and Client § 100, p. 927; *Couch* v. *Landers,* Mo. Sup. 316 S.W.2d 588, 391 S.W.2d at 615."

Any statements by defendant's counsel that could be construed as admissions were patently not so; their use against his client in the motion for summary judgment or at trial would have been improper. The lower court was correct in its refusal to consider the statements as admissions usable against the defendant. Counsel was not under oath offering testimony nor was he stipulating to a considered admission against his client, but was presenting one of several

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[13] 191 F.2d 705, 714 (5th Cir., 1951).

[14] 391 S.W.2d 608, 615 (Mo. Sup. 1965).

possible legal conclusions as to negate the liability of his client. Such was not a judicial admission as contemplated the law. Rather, it was:

> "Oral argument, [that] . . . does not come within the category of deliberate admissions of record, during the trial. Counsel was not a witness; he was an advocate who had no part in the negotiations with Birbeck and whose good faith defendant itself does not attack. The circumstances are such that we conclude that no binding effect should be charged against plaintiff for what amounted, at the most, to excessive zeal upon the part of counsel in the heat of argument.[15]"

IV. Vacating the Default Granted to the Cross-Claimant Curtis, Was Proper Under the Circumstances.

Appellant raised this matter by his first motion for summary reversal which was denied by this court on July 10, 1970. He has not added anything in his brief to his earlier motion, but relies entirely upon it.[16]

In Appellant's Motion, he would lead the Court to believe that the delay in certifying the case to the Ready Calendar was occasioned by Appellee Millikan or by his counsel. Nothing could be further from the truth. The docket entries reflect that on ten separate occasions Motions were made, either on behalf of the original Plaintiff, Mrs. Kojouharoff, or on the part of the Third-Party Defendant, Arthur S. Curtis, for a stay of the provisions of *Local Rule 13 of the United States District Court for the District of Columbia*, which, in pertinent part, provides as follows:

Rule 13

DISMISSAL FOR FAILURE TO PROSECUTE

(Revised June 27, 1961)

"(a) DISMISSAL WITHOUT PREJUDICE; NOTICE OF; WARNING. If a party seeking affirmative relief fails

---

[15] *Ferroline Corp.* v. *General Aniline & Film Corp.*, 207 F.2d 912, 917 (7th Cir., 1953).

[16] Appellee's argument is substantially similar to its opposition to appellant's motion for summary reversal filed herein.

> for six months from the time action may be taken to comply with any law, rule or order requisite to the prosecution of his claim, or to avail of a right arising through the default of failure of an adverse party, or take other action looking to the prosecution of his claim, or to file a certificate of readiness under Rule 11(d) within six months of the date of action is called on the call of the civil calendar, or within six months of the time a case is reinstated after being dismissed, the complaint, counterclaim, cross-claim, or third-party complaint of said party, as the case may be, shall stand dismissed without prejudice, whereupon the Clerk shall make entry of that fact and serve notice thereof by mail upon every party not in default for failure to appear, of which mailing he shall make an entry . . . "

This Local Rule clearly places the burden of moving a case forward upon the party seeking affirmative relief and if that party does not comply with the provisions of this Rule, the cause will stand dismissed against them, without prejudice.

It is true that up to May 22, 1968, Appellee's counsel did not file a responsive pleading to the Cross-Complaint filed against him by Curtis. During this period of time Curtis would have had the right to have sought a default for failure to plead. However, he did not follow that course, and on May 22, 1968, the Clerk, apparently acting on his own Motion, having noted that Curtis, as a Third-Party Defendant was outside the time limitations provided for in *Rule 13*, dismissed his Cross-Complaint nunc pro tunc. The dismissal was made effective as of July 3, 1967, which date is precisely six months subsequent to the last Order staying the operation of *Rule 13*, entered on November 21, 1966, setting as a time limitation for certifying to the Ready Calendar, January 3, 1967.

Thereafter, the docket entries reflect that on May 24, 1968, Curtis filed a Motion to Reinstate the Cross-Complaint and on June 5, 1968, Judge Curran signed an Order reinstating the Cross-Complaint of Arthur S. Curtis against Herman

A. Millikan. On the very next day, that is, one day after the Cross-Complaint had been reinstated, the Clerk entered a default against Millikan on Curtis' Cross-Complaint, not giving to Millikan an opportunity to file a responsive pleading thereto. Twelve days later, on June 18, 1968, Appellee, Millikan, filed a Motion to vacate the default and that Motion came on for hearing before the Assistant Pre-Trial Examiner on July 29, 1968. The Pre-Trial Examiner recommended that the default be vacated, a verified Answer having been filed on the same day as the Pre-Trial Examiner recommended vacation of the default. On June 30, 1968, counter-claimant Curtis filed a Motion to Strike the Answer which had been filed the preceding day and then on July 31, 1968, Curtis filed Objections to the Recommendations of the Pre-Trial Examiner. These latter two filings by Mr. Curtis came on for hearing before Judge Aubrey E. Robinson, Jr. on September 26, 1968 and Judge Robinson signed an Order denying the Motion to Strike the Answer and sustaining the Pre-Trial Examiner's Recommendation that the default entered on June 6, 1968 be vacated.

It is the Appellee's position that he had twenty days within which to file a responsive pleading to the reinstatement of the Cross-Complaint pursuant to Judge Curran's Order of June 5, 1968. The reinstatement of the Cross-Complaint of Curtis's amounted in legal contemplation, to a new filing, and the Clerk had no authority to move within one day to enter a default for failure to plead. The case relied upon by the Appellant, *Draisner* v. *Liss Realty Co., Inc.*, 94 U.S. App. D.C. p. 53, 1954; 211 F.2d 808, is not helpful. In *Draisner*, Appellee had been personally served, consulted counsel who was apparently not engaged, and then ignored three requests from counsel for the other side that he answer the Complaint. Over three years later, default was entered against Draisner and he thereupon moved to vacate the default and judgment entered thereon under *Rule 55, Federal Rules of Civil Procedure.* This Court held that the default was willful and intentional and therefore,

"good cause" for setting aside the entry could not be shown.

In the instant case, the default was not vacated under *Rule 55,* but rather because it was improperly entered by the Clerk without affording Appellee an opportunity to plead in timely fashion after the Cross-Complaint was reinstated on June 5, 1968. Had Curtis had a default entered prior to the time his Cross-Complaint was dismissed against him on May 22, 1968, a *Rule 55* situation would have been presented.

It is perhaps significant to point out that Millikan's counsel had answered the original Complaint filed by Curtis as counsel for Mrs. Kojouharoff in timely fashion on January 18, 1963, and had at the same time moved to implead Curtis as a Third-Party Defendant. An appearance having been entered, counsel would certainly have filed the simple general denial necessary to put the Cross-Complaint at issue had his unintentional oversight been called to his attention by Curtis. Trials on the merits of issues are favored in federal practice and defaults should be set aside where the moving party acts with reasonable promptness, alleges a meritorious defense to the action, and where the default has not been willful. *Thorpe* v. *Thorpe,* 124 U.S. App. D.C. 299; 364 F.2d 692. *Barber* v. *Turberville,* 94 U.S. App. D.C. 335; 218 F.2d 34.

V. Counsel, Excepting Exceptional Circumstances Not Present Here, Cannot Impeach Jury Verdict.

Appellant seeks to impeach the jury verdict returned in this case by relying upon a third person's affidavits as to answers of two jurors in response to questions directed to them concerning their deliberations. There are no affidavits from any juror, but only the hearsay information allegedly obtained by the agent for the plaintiffs. Plaintiffs raised this issue in their motions for a new trial which were denied by the trial court.

It has been a long established rule of law that testimony or affidavits of jurors or any other person impeaching a verdict rendered by them will not be received where the matters sought to be shown are such as adhere in the verdict.[17]

This Court considered this matter in *Economon* v. *Barry-Pate Motor Co.*[18] and held that jurors' affidavits would not be received or considered by the court to impeach their verdicts:

> "In unmistakeable language both this Court and the Supreme Court of the United States have held the general rule to be that the testimony of jurors will not be received to impeach their verdict, unless such testimony relates to extraneous influences brought to bear upon them." (Citations omitted) 55 App. D.C. at 145, 3 F.2d at 86.

This doctrine has been followed in our courts almost without exception since the Supreme Court in *McDonald* v. *Pless*[19] explained the rationale as follows:

> "But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publications and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harrassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant sub-

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[17] *Mattox* v. *United States*, 147 U.S. 140 (1892); *Hendrix* v. *United States*, 219 U.S. 79 (1911), overruled on another point, *Funk* v. *United States*, 290 U.S. 371; *McDonald* v. *Pless*, 238 U.S. 264 (1915); *State* v. *Hayden Miller Co.*, 236 Minn. 29, 116 N.W.2d 535, 539 (1962); 53 Am.Jur., *Trial* § 1105 at 769-770.

[18] 55 App. D.C. 143, 3F.2d 84 (1925).

[19] 238 U.S. 264 (1915).

> ject of public investigation—to the destruction of all frankness and freedom of discussion and conference." 238 U.S. at 267-268.

Even more compelling logic would apply to the situation where an affidavit of one not a juror is sought to be used to impeach the jury's verdict. As set forth in 53 Am. Jur. *Trial* § 1118:

> "The principle which prohibits the admission of affidavits of jurors to impeach their verdict is equally applicable to those of third persons who may have heard jurors make, subsequent to trial, statements likewise tending to impeach their verdict. As has been said, the policy and reasons which exclude the affidavits of jurors apply with increased force against their declarations without oath to third persons. If it is not properly allowable to put a verdict within the power of the affidavits of jurors, how much less allowable it must be to place the same verdict at the mercy of their mere declarations. It would mean the receipt, as competent evidence, of hearsay, the acknowledged source of which is incompetent.[20]"

Any attempt by appellants in either the motions for new trial or on appeal to impeach the jury verdict cannot be considered by this Court and was properly rebuffed by the trial court.

VI. Argument of Defendant's Counsel in Sunmmation Was Legitimate Comment Based Upon the Facts in Evidence

Appellant has reproduced in his brief one of the motions for a new trial which contains, *inter alia,* approximately one page of transcript of the closing argument, with emphasis supplied, of defendant's counsel and alleges it was so improper as to require a new trial under *Olenin* v. *Curtin & Johnson,* No. 21, 104 (D.C. Cir., Nov. 27, 1968).[21] In

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[20] 53 Am. Jur., *Trial* at 777-778.

[21] It is interesting to note that appellant herein was counsel for appellant Olenin at trial and on appeal in that case.

Olenin, the Court, while decrying the use of perjorative language by counsel in categorizing opposing witnesses or counsel as "liars", affirmed the verdict. It held the record on the whole did not warrant reversal.

Unfortunately, appellant did not produce the transcript of the testimony or even of the entire summation of defendant's counsel. What has been transcribed is a small portion taken out of context with emphasis added by appellants. Surely, this did not give the trial court (who had heard the entire argument) any basis for granting a new trial and cannot serve as a sufficient predicate for reversal on appeal.

Even if we accept only the transcribed portions of the argument on a substantive basis, there was no impropriety.

For in closing argument, where his remarks are based upon facts in the record, counsel may fairly and properly comment upon the credibility of witnesses, parties and opposing counsel.[22] In *Juaire* v. *Nardin*, the Second Circuit recognized the right of counsel to comment on the credibility of witnesses if the comment was supported by the record.[23] Again in *Collins* v. *Shishido*, which was a personal injury action involving a rear-end collision with a jury verdict for the defendant, the plaintiff raised on appeal the question of improper closing arguments.[24] The defense counsel had referred to the opposing party's testimony as a "lie" and had made similar comments concerning plaintiff's counsel. The Court, in affirming the verdict, held, "Defense counsel's attack on the credibility of plaintiff and his remark respecting plaintiff's counsel, being fully sustained by the evidence and supported by the record,

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[22] *Juaire* v. *Nardin*, 295 F.2d 373, 377-378 (2nd Cir., 1968).

[23] The court also cited the rule that isolated and casual statements although improper, are not prejudicial, if they do not reflect the quality of the argument as a whole. *Juaire*, supra, at 377-378.

[24] *Collins* v. *Shishido*, 48 H.411, 405 P.2d 323, 330-331; see also, 53 Am. Jur., *Trial* § 464, 88 C.J.S., *Trial*. § 185 at 366-369.

were, in our opinion, well within the scope of legitimate argument.'' [25]

There are no such terms used in the transcribed portion of the argument herein as are referred to in *Collins* and in *Olenin*. The comments of defendant's counsel were fully supported by the evidence. The matter as set forth in appellee's counter-statement of the facts and the exhibits before this Court reveal that the few remarks of counsel were amply supported by the record and a fair comment on the evidence.

VII. The Lower Court Was Correct in Requiring Counsel Other Than Appellant Curtis To Try Case

Appellant Curtis alleges the lower court erred in not allowing him to be trial counsel. He asserts he was the only counsel in the case until the day of trial, and, therefore, was best qualified to represent the plaintiffs. The record reveals the appearance of Jack Olender, Esquire, in behalf of the plaintiffs was entered on February 22, 1969, some seven months prior to trial.

The lower court's ruling was in accordance with the local rules and, more importantly, with Canon 19 of the Canons of Ethics.[26] Appellant Curtis was in the position of the only live eyewitness for the plaintiffs. This alone required him to withdraw from the case and retain other counsel. He would have been in the embarrassing predicament of testifying and having to argue the credibility and effect of his own testimony.[27]

Moreover, he was a defendant in the *Kojouharoff* case and could have been held liable for any damages awarded

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[25] 405 P. 2d at 330.

[26] The Code of Professional Responsibility (eff. Jan. 1, 1970) Canon 5 and Disciplinary Rule 5-102 specifically require the withdrawal as counsel when the lawyer becomes a witness. Cf. ABA Opinions 220 (1941), 185 (1938) and 50 (1931).

[27] *Galarowicz* v. *Ward*, 119 Utah 611, 620, 230 P.2d 576, 580 (1951).

her, although he was supposed to be representing her interests. Finally, he became the personal representative of her estate. Appellant was, in effect, representing several possible conflicting interests at the same time. Although it could have, the lower court did not require Curtis to withdraw. Indeed, Curtis admits he was allowed to participate in bench conferences and in chambers discussions. He was foreclosed only from asking questions and delivering arguments to the jury. There was no abuse of the lower court's discretion and no resultant prejudice to the appellants by requiring counsel other than appellant Curtis to try the case.

CONCLUSION

For the foregoing reasons and upon the authorities cited, the appellee, Herman A. Millikan, states that the lower court's rulings were correct and the jury verdict was in accordance with the evidence. The judgment entered by the court below should be affirmed.

Respectfully submitted,

McCarthy and Wharton

By: Joseph S. McCarthy
Joseph S. McCarthy
Attorney for Appellee
100 South Washington Street
Rockville, Maryland 20850
762-7770